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STATE OF INDIANA

INDIANA UTILITY REGULATORY COMMISSION

AUG 16 2001

INDIANA UTILITY REGULATORY COMMISSION

IN THE MATTER OF THE PETITION OF INDIANA)
BELL TELEPHONE COMPANY, INCORPORATED,)
D/B/A AMERITECH INDIANA PURSUANT TO)
I.C. 8-1-2-61 FOR A THREE PHASE PROCESS FOR)
COMMISSION REVIEW OF VARIOUS)
SUBMISSIONS OF AMERITECH INDIANA TO)
SHOW COMPLIANCE WITH SECTION 271(c) OF)
THE TELECOMMUNICATIONS ACT OF 1996)

CAUSE NO. 41657

AMERITECH ADVANCED DATA SERVICES OF INDIANA, INC.
d/b/a SBC ADVANCED SOLUTIONS, INC.'S VERIFIED REPLY
TO RESPONSES OF THE INDIANA CLECS

Ameritech Advanced Data Services of Indiana, Inc. d/b/a SBC Advanced Solutions ("AADS"), by counsel, respectfully files this Verified Reply to the Responses of the Indiana CLECs ("Verified Reply") with the Indiana Utility Regulatory Commission ("Commission"). The Indiana CLECs filed two responses, one on August 6, 2001, and another under cover letter dated August 9, 2001 (collectively, the "Response"), in opposition to AADS's request for a stay. The Response incorrectly states and analyzes the irreparable harm to AADS and misapplies relevant federal and state law when analyzing AADS's likelihood of success on the merits in AADS's appeal of the Order on EDR-1 in this Cause issued by the Commission on June 27, 2001 ("Appealed Order").

I. AADS Will Suffer Irreparable Harm Without a Stay.

The Indiana CLECs fail to rebut the irreparable harm that AADS will suffer without a stay: The substantial diversion of resources away from its wholesale DSL Transport business and toward test implementation and OSS conversion. Instead of directly addressing the irreparable harm to AADS, the Indiana CLECs confuse the facts and ignore relevant case

law. For example, the Indiana CLECs claim that AADS represented that it will suffer irreparable harm because “it has to create and implement a number of changes to AADS’ OSS systems in order to comply.” *Response of the Indiana CLECs*, p.2, August 6, 2001. In AADS’s Verified Motion to Stay Implementation filed July 27, 2001 (“Verified Motion”), in this Cause, AADS clearly explained in numbered paragraph 5 that, in order to accommodate the OSS test, AADS must:

(i) restructure its internal organization to the extent that creating an internal operations unit to create, implement and oversee testing of AADS’s DSL Transport OSS is required; (ii) create testing programs that are complex, costly and burdensome and that may be rendered moot and unnecessary; (iii) siphon employees currently performing functions to provide wholesale DSL Transport to AADS’s customers and assign them to tasks associated with testing; and (iv) delay implementation of its business plan, as explained to the Commission in Cause No. 41660, AADS’s CTA cause, to accommodate the testing programs referenced above.

AADS did not claim that changes to its OSS would amount to irreparable harm. AADS can make changes in its OSS, and is in fact planning to do so as set forth in its Verified Supplemental Motion to Stay Implementation filed with the Commission on August 6, 2001¹ (“Verified Supplemental Motion”). Instead, the irreparable harm to AADS will occur from diverting AADS’s resources away from its wholesale DSL Transport business and allocating those resources toward test implementation and OSS conversion of systems that will not be used on a going forward basis.

The Indiana CLECs attack the timing of the OSS conversion by AADS. *Response of the Indiana CLECs*, p.2, August 9, 2001. Since the SBC-Ameritech merger and for significant business reasons, AADS has been considering a switch in its OSS, but had no stated time frame for the switch until recently. In any event, the OSS conversion was not relevant to the Affidavit

¹ As stated in the Verified Supplemental Motion, AADS will be migrating to a different OSS in the first quarter of 2002 to standardize its OSS platform with that used in the other 8-state operating region.

of John Habeeb filed in this Cause, and the Indiana CLECs' argument that AADS's OSS conversion should have been noted in Mr. Habeeb's affidavit is misguided because a possible change in OSS was not relevant to any issue Mr. Habeeb addressed in his previous affidavits. Moreover, AADS did not want to inform its customers of the OSS change by way of a pleading filed with a regulatory body. AADS wanted to inform its customers by letter before the OSS conversion was announced in a regulatory proceeding.

The Indiana CLECs also argue that because OSS changes occur constantly, AADS's OSS conversion should not be a big deal. The Indiana CLECs, however, overlook the fact that OSS testing and conversion is not the typical scenario for AADS, thus making the Indiana CLECs' analogy to Ameritech Indiana inapt for purposes of determining irreparable harm. AADS would have to start at ground zero for OSS testing, and then layer over this a further and equally new conversion process.

The Indiana CLECs make the allegation that AADS "has adamantly refused to comply with its obligations[.]" *Response of the Indiana CLECs*, p.3, August 6, 2001. AADS outright denies the Indiana CLECs' irresponsible and incendiary allegations. AADS maintains that it is in full compliance with its obligations as set forth in its CTA granted in Cause No. 41660.

The Indiana CLECs complain that AADS has included "extra-record" facts when asserting the above-noted irreparable harm to AADS. However, the Commission's Rules of Procedure specifically contemplate motions supported by material not of record. *See* 170 IAC 1-1.1-12(b). AADS verified the facts contained in the Verified Motion and in the Verified Supplemental Motion; the Indiana CLECs, however, neither verified nor supported by affidavit

any of the extra-record assertions made in the Response. Thus, AADS moves to strike all portions of the CLECs' Response that assert facts not contained in the record of this proceeding.²

Finally, the Indiana CLECs argue that they are the parties who will be irreparably harmed because, "they would have no ability to enter the Indiana DSL market via resale of [AADS's] DSL [T]ransport[.]" *Response of the Indiana CLECS*, p. 4, August 6, 2001. This is an untrue statement because AADS's DSL Transport is available for resale to any party that wishes to enter into an interconnection agreement with AADS. For example, AADS filed an interconnection agreement ("Interconnection Agreement") between AADS and IG2, Inc. with the Commission on August 6, 2001. The Interconnection Agreement includes provisions pertaining to the resale of DSL Transport. Not only are the Indiana CLECs' assertions that they are foreclosed from obtaining DSL Transport patently false, they are raised in a proceeding that is about Ameritech Indiana's OSS test and not about the Indiana CLECs' access to the Indiana DSL market. Thus, the Indiana CLECs are attempting to inappropriately expand the scope of this proceeding to include an OSS test of AADS's DSL Transport.

II. AADS Has a Reasonable Likelihood of Success on the Merits.

The Indiana CLECs apply an incorrect test and, without citation or support, discount the omission of AADS as a necessary party to the proceedings when measuring the likelihood of success on the merits. The test is that for the resale obligations of § 251(c)(4) to apply, it must be shown that the service is both a telecommunications service and offered at retail. AADS offers a telecommunications product, DSL Transport, to Internet Service Providers ("ISPs") but

² For example, the Indiana CLECs assert that they will "have no ability to enter the Indiana DSL market via resale of Ameritech DSL [T]ransport" if the Commission grants a stay. *Response of the Indiana CLECS*, p.4, August 6, 2001. This statement is not only unverified, but it is also patently false as discussed *infra*.

not at retail. Therefore, the § 251(c)(4) resale obligations are not implicated in this offering.³

Even if the separate affiliate status of Ameritech Indiana, AADS and AIMS is ignored, there is still no resale obligation under § 251(c)(4) because DSL Transport (a telecommunications product), even if offered directly by Ameritech Indiana, would still be wholesale when offered to ISPs. Moreover, AADS did not appeal its CTA Order in Cause No. 41660 because, in part, AADS planned to voluntarily offer interconnection agreements, which include resale provisions for DSL Transport and which comply with relevant law. Because of such voluntary offer, the “successor or assign” issue identified in the *ASCENT* decision (235 F.3d 662 (D.C. Cir. January 9, 2001)) and in AADS’s CTA Order in Cause No. 41660 is irrelevant to this proceeding.

As evidence “supporting” their argument that AADS is under the “binding legal obligation” to offer DSL Transport “for resale at wholesale rates” (*Response of the Indiana CLECS*, p.2, August 6, 2001), the Indiana CLECs point to Verizon Advanced Data, Inc.’s (“VADI”) July 25, 2001 tariff filing in Indiana. *Id.*, p.3, FN 4. The Indiana CLECs clearly have misread VADI’s Indiana tariff (“VADI Tariff”): The VADI Tariff does not apply to DSL. Section 5 of the VADI Tariff sets forth the data services and rates for the services subject to the VADI Tariff: Asynchronous Transfer Mode Service and Frame Relay Service. A copy of the tariff sheet (“VADI Amendment”) filed by VADI on July 25, 2001, is attached as Exhibit A hereto and made a part hereof, which clearly shows that VADI only offers wholesale rates on telecommunications services (that are subject to the VADI Tariff – *i.e.*, not DSL Transport) that are provided at retail.

Moreover, the argument that AADS is an entity created for the sole purpose of evading the obligations of § 251(c)(4) is erroneous. AADS was incorporated in 1992, four (4) years

³ Ameritech Interactive Media Services, Inc. (“AIMS”) offers internet access service at retail, but the services are not telecommunications services. Thus, AIMS’s services also do not implicate the resale provisions of § 251(c)(4).

before the Telecommunications Act of 1996 was enacted. AADS has been providing advanced services in Indiana since 1993, as stated in the Affidavit of John Habeeb, Paragraph 4. In fact, AADS is required by the FCC's merger conditions to be a separate entity from Ameritech Indiana. *In re Applications of Ameritech and SBC Communications*, (Merger Order) 14 FCC Rcd 14712 *Appendix C, Sec. I* (October 6, 1999). Thus, AADS cannot be, and is not, part of a corporate structure instituted to carry out an end-around of the regulatory framework set forth in the Telecommunications Act of 1996.

The proceedings in this Cause leading up to the issuance of the Appealed Order did not include AADS, and thus, deprived AADS of due process. The Indiana CLECs argue that AADS received due process on the basis that: (i) an affiliate company was a party to the proceeding; (ii) an employee of AADS provided an affidavit to Ameritech Indiana for use in the proceeding; and (iii) AADS personnel participated in a conference call involving the OSS test. The Indiana CLECs cite no statute or case law supportive of this argument that AADS should be attributed party status in order to satisfy due process requirements.

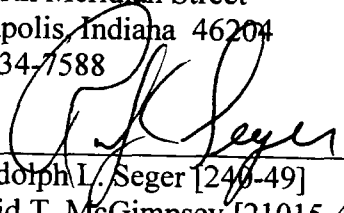
The Indiana CLECs have a good reason for their failure to cite any authority for their position: Relevant law does not provide for attribution of party status in a proceeding in which an affiliate company is a party. Neither the *ASCENT* decisions (--F.3d --, No. 00-1144 (D.C. Cir. June 26, 2001); and 235 F.3d 662 (D.C. Cir. January 9, 2001)), nor the affiliate statute in the Indiana Code (Ind. Code § 8-1-2-49), nor the Commission's Rules of Procedure (either 170 IAC 1-1-1 *et seq.* or 170 IAC 1-1.1-1 *et seq.*) nor the Commission's Order in the *ProLiance* case (Cause No. 40437, September 27, 1996 Order) permit attribution of party status because employees provide information in a proceeding. The simple fact is that AADS, a separate entity, was not a party to Cause No. 41657 when the Commission issued the Appealed Order.

For example, in the *ProLiance* Order, the Commission found that ProLiance should remain a party to a proceeding involving its public utility affiliates, Indiana Gas and Citizens Gas, to the extent that ProLiance was required to provide discovery and respond to Commission requests for information pursuant to Indiana Code § 8-1-2-49. In the *ProLiance* Order, the Commission denied, in part, ProLiance's Motion to Dismiss, even though the Commission found that it did not have general jurisdiction over ProLiance. The Commission ruled that ProLiance, pursuant to Indiana Code § 8-1-2-49, was required to remain a party for discovery purposes. Here, the Commission ordered AADS to act when AADS was not even a party. If the Commission required that ProLiance be a party to the proceedings simply to answer discovery, then surely AADS should be a necessary party to a proceeding, like this one, where the Commission affirmatively ordered AADS to undergo OSS testing.

WHEREFORE, Intervenor, Ameritech Advanced Data Services of Indiana, Inc. d/b/a SBC Advanced Solutions, Inc., for the reasons set forth herein, in its Verified Motion and in its Supplemental Motion, respectfully requests the Indiana Utility Regulatory Commission to stay the implementation of the Commission's Order on EDR-1 in this Cause approved on June 27, 2001, pending the resolution of the appeal taken therefrom and for all other appropriate relief.

Respectfully submitted,

McHALE, COOK & WELCH, p.c.
1100 Chamber of Commerce Building
320 North Meridian Street
Indianapolis, Indiana 46204
(317) 634-7588

By: 
Randolph L. Seger [240-49]
David T. McGimpsey [21015-49]

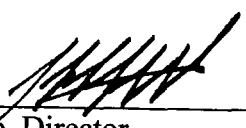
Attorneys for Ameritech Advanced Data Services of
Indiana, Inc. d/b/a SBC Advanced Solutions, Inc.

VERIFICATION

I affirm, under penalties for perjury, that the representations contained in the foregoing Ameritech Advanced Data Services of Indiana, Inc. d/b/a SBC Advanced Solutions, Inc.'s Verified Reply to Response of the Indiana CLECS are true and correct to the best of my knowledge, information and belief.

AMERITECH ADVANCED DATA SERVICES OF
INDIANA, INC. d/b/a SBC ADVANCED SOLUTIONS,
INC.

By: _____


John Habeeb, Director,
Regulatory-Interconnection

CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the foregoing have been served electronically upon the Ameritech 271 distribution list at Ameritech271@urc.state.in.us and upon the following counsel of record and other interested persons by United States Mail, first-class postage pre-paid, this ~~16~~th day of August, 2001.

Kris Kern-Wheeler, Esquire
Indiana Utility Regulatory Commission
Indiana Government Center South, Suite E306
302 West Washington Street
Indianapolis, Indiana 46204

Karol Krohn, Esquire
Office of Utility Consumer Counselor
Indiana Government Center North
100 North Senate, Room N501
Indianapolis, Indiana 46204

Mr. Jack R. Boheim
President
MTG Consulting
Post Office Box 2448
Mendocino, California 95460

Mr. Frank Darr
National Regulatory Research Institute
1080 Carmack Road
Columbus, Ohio 43210

Mr. John Kern
2300 North Barrington Road, Suite 400
Hoffman Estates, Illinois 60195

Michael J. Huston, Esquire
Michael E. Allen, Esquire
BAKER & DANIELS
300 North Meridian Street, Suite 2700
Indianapolis, Indiana 46204

Robert K. Johnson, Esquire
Christopher C. Earle, Esquire
BOSE McKINNEY & EVANS
2700 First Indiana Plaza
135 North Pennsylvania Street
Indianapolis, Indiana 46204

Robert J. Aamoth, Esquire
Andrew M. Klein, Esquire
KELLEY DRYE & WARREN LLP
1200 19th Street, N.W.
Washington, D.C. 20036

Nikki Gray Shoultz, Esquire
SOMMER & BARNARD, PC
4000 Bank One Tower
111 Monument Circle
Indianapolis, Indiana 46204

Richard E. Aikman, Jr., Esquire
Annette M. Engle, Esquire
STEWART & IRWIN, P.C.
251 East Ohio Street, Suite 1100
Indianapolis, Indiana 46204-2142

William Powers, Esquire
111 Monument Circle, Suite 302
Indianapolis, Indiana 46204

Douglas W. Trabaris, Esquire
Senior Attorney
AT&T Corporation
222 West Adams, 15th Floor
Chicago, Illinois 60606

William A. Haas, Esquire
McLeodUSA Telecommunications
Services, Inc.
McLeodUSA Technology Park
Post Office Box 3177
Cedar Rapids, Iowa 52406-3177

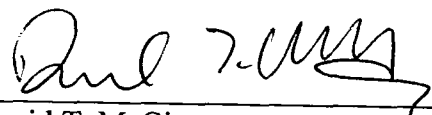
Charles R. Mercer, Jr., Esquire
Sprint Communications Company, L.P.
One North Capitol Avenue, Suite 540
Indianapolis, Indiana 46204

Ellyn Elise Crutcher, Esquire
Associate General Counsel
McLeodUSA Telecommunications Services, Inc.
121 South 17th Street
Mattoon, Illinois 61938

Pam Sherwood, Esquire
Vice President Regulatory Affairs,
Midwest Division
Time Warner Communications
4625 West 86th Street, Suite 500
Indianapolis, Indiana 46268

Bonnie K. Simmons, Esquire
AMERITECH INDIANA
240 North Meridian Street, Room 1831
Indianapolis, Indiana 46204

Peter J. Rusthoven, Esquire
Teresa E. Morton, Esquire
Michael R. Fruehwald, Esquire
BARNES & THORNBURG
11 South Meridian Street
Indianapolis, Indiana 46204



David T. McGimpsey

EXHIBIT A

Verizon Advanced Data, Inc. Tariff Amendment

SECTION 3 - APPLICATION OF RATES**3.1 Availability of Service**

Company's service is furnished to Customers for data communications originating and terminating within the State of Indiana under the terms and conditions of this Tariff. Company's service is available 24 hours per day, seven days per week unless otherwise specified herein.

Company arranges for installation, operation, and maintenance of the service provided in this Tariff for Customer in accordance with the terms and conditions set forth in this Tariff. Company may, when authorized by Customer, act as Customer's agent for ordering access connection facilities provided by other carriers or entities (such as the LEC), to allow connection of a Customer's location to Company's service. Customer shall be responsible for all charges due for such service arrangements.

Any telecommunication services provided under this Tariff at retail to Customers who are not telecommunications carriers are available at wholesale rates to telecommunications carriers pursuant to 47 U.S.C. §251(c)(4) of the Telecommunications Act of 1996. (N)
(N)

RECEIVED
JUL 25 2001
INDIANA UTILITY REGULATORY COMMISSION
TELECOMMUNICATIONS DIVISION

Issued: July 25, 2001

Effective: July 26, 2001

by:

John Cullina, Secretary and General Counsel
Verizon Advanced Data Inc.
1320 N. Courthouse Road, 8th Floor
Arlington, Virginia 22201